



**<PRORULE>**

**<PREAMB>**

**<AGENCY TYPE='S'>DEPARTMENT OF TRANSPORTATION**

**<SUBAGY>Federal Highway Administration**

**<CFR>23 CFR Part 790**

**<DEPDO>[FHWA Docket No. FHWA-2013-0018]**

**<RIN>RIN 2125-AF63**

**<SUBJECT>Congestion Mitigation and Air Quality Improvement (CMAQ)**

**Program**

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The CMAQ program provides funding to State and local governments for transportation projects and programs to help meet the requirements of the Clean Air Act (CAA). Funding is available to reduce congestion and improve air quality for areas that do not meet the National Ambient Air Quality Standards (NAAQS) for ozone, carbon monoxide (CO), or particulate matter (nonattainment areas) and for areas that were out of compliance but have now met the standards (maintenance areas). The Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21) requires priority use of CMAQ funds in areas that are designated nonattainment or maintenance for fine particulate matter (PM<sub>2.5</sub>) NAAQS under the CAA. Specifically, an amount equal to 25 percent of the CMAQ funds apportioned to each State for a nonattainment or maintenance area that is based all or in part on the weighted population of the PM<sub>2.5</sub> nonattainment area shall be obligated

to projects that reduce PM<sub>2.5</sub> emissions in such area. These projects include diesel retrofits for on-road and some off-road applications, as well as for diesel equipment operated on a highway construction project within PM<sub>2.5</sub> nonattainment and maintenance areas.

Although the MAP-21 language for the CMAQ funds that must be obligated for PM<sub>2.5</sub> projects (referred to in this NPRM as a “set-aside”) instructs that the set-aside be calculated based on “weighted population” for PM<sub>2.5</sub>, the statute does not specify the values to be applied to determine the weighted population. In this proposed rule, FHWA is requesting comments on a proposed weighting factor of 5, to be used in determining the weighted population of a PM<sub>2.5</sub> nonattainment area.

**DATES:** Comments must be received on or before October 3, 2014. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, 1200 New Jersey Avenue, SE., Washington, DC 20590, or submit electronically at [www.regulations.gov](http://www.regulations.gov) or fax comments to 202-493-2251. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf

of an association, business, or labor union). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (Volume 65, Number 70, Pages 19477-78).

**FOR FURTHER INFORMATION CONTACT:** Ms. Cecilia Ho, Office of Natural Environment, HEPN, 202-366-9862, or Ms. Janet Myers, Office of the Chief Counsel, 202-366-2019, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**<HD1>Electronic Access and Filing**

You may submit or retrieve comments online through the Document Management System at: <http://www.regulations.gov>. Electronic submission and retrieval help and guidelines are available under the help section of the Web site. It is available 24 hours each day, 365 days each year. Please follow the instructions. An electronic copy of this document may also be downloaded by accessing the Federal Register's home page at: <http://www.federalregister.gov>.

**EXECUTIVE SUMMARY**

**<HD1>I. Purpose of the Regulatory Action**

This regulation seeks to establish a proposed weighting factor of 5, to be used in determining the weighted population of a PM<sub>2.5</sub> nonattainment area. Although the MAP-21 language for the CMAQ funds that must be obligated for PM<sub>2.5</sub> projects instructs that the set-aside be calculated based on "weighted population" for PM<sub>2.5</sub>, the statute does not specify the values to be applied to determine the weighted population.

Section 1113(b)(6) of MAP-21 amends 23 U.S.C. 149 by adding subsection (k)(1) that requires priority use of CMAQ funds in areas that are designated nonattainment or maintenance for the PM<sub>2.5</sub> NAAQS.<sup>1</sup> Specifically, 23 U.S.C. 149(k)(1) states that an amount equal to 25 percent of the funds attributed to PM<sub>2.5</sub> nonattainment in each of the affected States must be used for projects that reduced PM<sub>2.5</sub> emissions in those nonattainment and maintenance areas.

Although this MAP-21 language states that the PM<sub>2.5</sub> set-aside must be calculated based on “weighted population,” it is not specific regarding what that weighting factor should be. Because the language does not specify values to be applied to determine the weighted population, that determination must be made by FHWA as the agency implementing the CMAQ Program.

## **<HD1>II. Summary of the Major Provisions of the Regulatory Action in Question**

Section 790.107(d). Weighting Factors for Determining Weighted Populations. Subsection (d) would incorporate the weighting factor chosen by FHWA for PM<sub>2.5</sub> as a result of this rulemaking. The MAP-21 makes clear that populations in PM<sub>2.5</sub> nonattainment areas must be weighted, but it does not establish a specific weighting factor for those populations. This subsection would establish an appropriate weighting factor for PM<sub>2.5</sub>. The FHWA is seeking comments on establishing a weighting factor of 5 for PM<sub>2.5</sub> populations, as discussed below.

## **<HD1>III. Costs and Benefits**

This rulemaking proposes to set forth requirements for the CMAQ Program,

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<sup>1</sup> The EPA has set both an annual and a 24-hour NAAQS for PM<sub>2.5</sub> (40 CFR 50.7).

which would not change overall levels of State apportionments. Regardless of the weighting factor for PM<sub>2.5</sub> that FHWA chooses to establish through this rulemaking, a State's total apportionment under the CMAQ program will not change; only the amount that the State would be required to set-aside for projects that reduce PM<sub>2.5</sub> would change. Regardless of the weighting factor selected, only modest differences would result in the portion set aside for PM<sub>2.5</sub>. This rulemaking may result in minimal costs to grantees, and FHWA seeks comment on administrative or other costs that may be incurred as a result of the proposed weighting factor.

#### **<HD1>Background**

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (Pub. L. 102-240, 105 Stat. 1914) established the CMAQ Program. The program provides funding to State and local governments for transportation projects and programs to help meet the requirements of the CAA (42 U.S.C. 7401 *et seq.*). Funding is available to reduce congestion and improve air quality for areas that do not meet the NAAQS for ozone, CO, or particulate matter (nonattainment areas) and for areas that were out of compliance but have now met the standards (maintenance areas). The program was reauthorized under the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, 112 Stat. 107) in 1998, under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, 119 Stat. 1144) in 2005, and most recently under MAP-21 (Pub. L. 112-141, 126 Stat. 405) in 2012.

The CMAQ Program supports two important DOT goals: improving air quality and relieving congestion. This program helps States and metropolitan areas meet their

CAA obligations in nonattainment and maintenance areas. Additionally, MAP-21 puts an increased focus on addressing PM<sub>2.5</sub> emissions, also referred to as “fine particulate matter.”

The PM<sub>2.5</sub> can create significant health risks at levels above the NAAQS, including premature death from heart and lung diseases. Newly available information<sup>2</sup> for fine particles provides a substantially stronger level of confidence compared to previous reviews about a causal relationship between long- and short-term exposures to PM<sub>2.5</sub> and mortality and cardiovascular and respiratory effects. The studies indicate that fine particles pose a serious public health problem. Exposure to fine particulate pollution at levels above the NAAQS can cause premature death and harmful effects on the cardiovascular system (the heart, blood, and blood vessels). Fine particle exposure also is linked to a variety of other public health problems, including respiratory diseases.<sup>3</sup> An extensive body of scientific evidence indicates that breathing in PM<sub>2.5</sub> over the course of hours to days (short-term exposure) and months to years (long-term exposure) can cause serious public health effects that include premature death and adverse cardiovascular and respiratory effects.

The health effects of PM<sub>2.5</sub> are also greater when compared to the effects of other pollutants. For example, results of one recent research study<sup>4</sup> found that exposure to

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<sup>2</sup> U.S. EPA. Integrated Science Assessment for Particulate Matter (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-08/139F, 2009 (available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=216546>); EPA National Ambient Air Quality Standards for Particulate Matter: Final rule, 78 FR 3086 (January 15, 2013) (available at <http://www.gpo.gov/fdsys/pkg/FR-2013-01-15/pdf/2012-30946.pdf>).

<sup>3</sup> EPA. Particle Pollution and Health, 2012 (available at <http://www.epa.gov/pm/2012/decfshealth.pdf>).

<sup>4</sup> Fann N, Lamson A, Wesson K, Risley D, Anenberg SC, Hubbell BJ. Estimating the National Public Health Burden Associated with Exposure to Ambient PM<sub>2.5</sub> and Ozone. Risk Analysis; 2011 (available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1539-6924.2011.01630.x/full>).

modeled 2005 air quality concentrations relative to non-anthropogenic background air quality concentrations of PM<sub>2.5</sub> was estimated to result in approximately 130,000 (51,000 – 200,000)<sup>5</sup> premature deaths nationally for people greater than age 29, while ozone was predicted to result in approximately 19,000 (7,600 – 29,000) premature deaths nationally for people greater than age 29. The health benefits of reducing PM<sub>2.5</sub> are particularly large because the relationship between PM<sub>2.5</sub> and mortality is stronger than for ozone. Therefore, the avoided mortality due to reductions in PM<sub>2.5</sub> will be greater than proportional reductions in ozone.

**<HD1>I. Issue to be Addressed by Rulemaking**

Section 1113(b)(6) of MAP-21 amends 23 U.S.C. 149 by adding subsection (k)(1) that requires priority use of CMAQ funds in areas that are designated nonattainment or maintenance for the PM<sub>2.5</sub> NAAQS.<sup>6</sup> Specifically, 23 U.S.C. 149(k)(1) states:

For any State that has a nonattainment or maintenance area for fine particulate matter, an amount equal to 25 percent of the funds apportioned to each State under section 104(b)(4) for a nonattainment or maintenance area that are based all or in part on the weighted population of such area in fine particulate matter nonattainment shall be obligated to projects that reduce such fine particulate matter emissions in such area, including diesel retrofits.

Although this MAP-21 language states that the PM<sub>2.5</sub> set-aside must be calculated based on “weighted population,” it is not specific regarding what that weighting factor should be. Because the language does not specify values to be applied to determine the weighted population, that determination must be made by FHWA as the agency implementing the CMAQ Program.

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<sup>5</sup> The ranges presented in parentheses for each health impact represents the 95 percent confidence interval calculated using a Monte Carlo method based on the standard error reported in each epidemiological study included in this analysis.

<sup>6</sup> The EPA has set both an annual and a 24-hour NAAQS for PM<sub>2.5</sub> (40 CFR 50.7).

Giving a higher or lower weighting factor to PM<sub>2.5</sub> populations will not affect each State's overall CMAQ apportionment. It may affect only the portion of each State's overall CMAQ apportionment required to be obligated for projects that reduce PM<sub>2.5</sub> emissions. Generally, a higher weighting factor would mean States must spend more funds on PM<sub>2.5</sub> reduction strategies; a lower weighting factor would mean lower mandated spending on PM<sub>2.5</sub> projects.

## **<HD1>II. Background of the Proposal**

Under ISTEA, TEA-21, and SAFETEA-LU, funding apportionments for each State were calculated based on a formula for weighted populations in ozone and CO nonattainment and maintenance areas. All three prior transportation authorizations contained specific weighting factors to be used in the calculations. Unlike previous legislation, MAP-21 does not include a statutory distribution formula for CMAQ apportionment, although it indirectly references the former statutory formula. Beginning on October 1, 2012, a State's CMAQ apportionment is determined by multiplying a State's total amount for all apportioned programs under MAP-21 by the share of the State's total Fiscal Year (FY) 2009 apportionments for the CMAQ Program, based on the statutory formula at the time.<sup>7</sup>

For the PM<sub>2.5</sub> set-aside calculation, FHWA is following the prior statutory approach to weighted population formulas. To determine the 25 percent that States must set-aside for PM<sub>2.5</sub> nonattainment and maintenance areas, FHWA must determine weighted populations for ozone, CO, and PM<sub>2.5</sub> nonattainment and maintenance areas. The weighted population numbers provide a means to reflect the severity of the air

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<sup>7</sup> 23 U.S.C. 104(b)(4)



quality problems among the populations of the areas in nonattainment and maintenance for ozone, CO, and in nonattainment for PM<sub>2.5</sub>. The FHWA is using the weighting factors in the most recent statutory apportionment formula from SAFETEA-LU for ozone and CO. Because MAP-21 and prior legislation did not include a PM<sub>2.5</sub> weighting factor in CMAQ apportionment formulas, FHWA is proposing to assign a new weighting factor to PM<sub>2.5</sub>. For informational purposes, the process of how weighted population is calculated is described below.

The FHWA will continue to use the weighted population formula, which was used in prior statutes, under MAP-21. To determine the amount of the PM<sub>2.5</sub> set-aside, based on the congressional description of the set-aside, requires several mathematical steps. The first step is to determine the part of the State's net CMAQ apportionment that is attributable to PM<sub>2.5</sub> nonattainment and maintenance. The State's weighted populations in nonattainment and maintenance areas are determined for all three criteria pollutants (ozone, CO, and PM<sub>2.5</sub>) by multiplying the population in each county with a nonattainment or maintenance area, by the weighting factors for each pollutant for which the county is in nonattainment or maintenance status, to determine the State's weighted population by county for each criteria pollutant. The weighted populations of all counties for each pollutant (ozone, CO, and PM<sub>2.5</sub>) are then added up to determine the State's total weighted population for all three of these criteria pollutants. The weighted populations for all counties in nonattainment or maintenance status for PM<sub>2.5</sub> are added up and divided by the State's total weighted population for all three criteria pollutants to determine the percentage of the State's total weighted population for all three criteria pollutants that are attributable to PM<sub>2.5</sub>. The net CMAQ apportionment amount then is

multiplied by the PM<sub>2.5</sub> percentage to determine the amount of the net CMAQ apportionment amount attributable to PM<sub>2.5</sub> pollutants. The resulting number is multiplied by 25 percent to arrive at the PM<sub>2.5</sub> set-aside under 23 U.S.C. 149(k)(1). States are to spend that set-aside only on PM<sub>2.5</sub> projects, as chosen by the States, in the nonattainment or maintenance areas for PM<sub>2.5</sub>. This is not meant to imply that areas cannot spend additional CMAQ funds on PM<sub>2.5</sub> projects.

To calculate the weighted population of an area under 23 U.S.C. 149(k)(1), FHWA will use updated populations based on the most recent data available from the U.S. Census Bureau for each county, or part of a county, that is designated nonattainment or maintenance for ozone, CO, or PM<sub>2.5</sub>. The U.S. Census Bureau provides annual estimates of county populations, and FHWA historically has used this jurisdictional level to determine CMAQ apportionments. Updated populations will then be given a relative value—a weighting—that corresponds to the nonattainment designation and severity of the criteria pollutant classification of the area, as established under the CAA. While MAP-21 does not include a weighted population, FHWA uses the weighting factors in the most recent statutory apportionment formula from SAFETEA-LU for ozone and CO, since retaining these weights would be consistent with MAP-21 provisions for using State's FY 2009 apportionments as the basis for calculating CMAQ apportionments funding under MAP-21. Because MAP-21 and prior legislation did not include a PM<sub>2.5</sub> weighting factor in CMAQ apportionment formulas, FHWA is proposing to assign a new weighting factor to PM<sub>2.5</sub>.

For FY 2013 and 2014, FHWA implemented the MAP-21 changes by an administrative determination to use a weighting factor of 1.2 for PM<sub>2.5</sub> areas. The

outcome of this rulemaking will not affect the calculations made for FY 2013 and 2014, and FHWA will continue to use the interim weighting factor of 1.2 until a factor is established through this rulemaking. The administrative determination to use a weighting factor of 1.2 for the PM<sub>2.5</sub> areas was based on the following: first, FHWA noted that the earlier Senate version of MAP-21 (section 1113(j)(6) of S. 1813) included a 1.2 weighting factor for an apportionment formula for areas designated nonattainment or maintenance for PM<sub>2.5</sub>. Second, historically, the weighting factors applied ranged from 1.0 for CO and the lowest ozone classification to 1.4 for the highest ozone classification. A weighting factor of 1.2 is the midpoint value of that range, which would put PM<sub>2.5</sub> at a comparable level with the two other criteria pollutants (CO and ozone) under prior legislation. Finally, FHWA considered that, while a weight of 1.2 would set the floor for the 25 percent set-aside, it would not preclude a State from investing more funding on PM<sub>2.5</sub> strategies if the State determined that it was the most appropriate use of its funds. However, due to the serious health impacts of PM<sub>2.5</sub> as discussed in Section I, FHWA has decided to seek the benefit of public comment to evaluate the appropriate PM<sub>2.5</sub> weighting factor through the rulemaking process. The FHWA will continue to use 1.2 as the weighting factor for determining PM<sub>2.5</sub> set-aside until the rulemaking is completed.

The weighting factor for PM<sub>2.5</sub> is the focus of this rulemaking. The FHWA also proposes to include the prior statutory weighting factors for ozone and CO in the rule text because those factors are used in the calculation of the PM<sub>2.5</sub> set-aside. However, since the ozone and CO weighting factors are already incorporated in the calculation of the CMAQ apportionments established under MAP-21, FHWA is not considering changes to these weighting factors.

### **<HD1>III. Section-by-Section Discussion of the Proposal**

Following is a discussion of each of the Sections in the proposed rule:

Section 790.101 Purpose. This section sets forth the purpose of the proposed regulation, explaining that it is intended to establish a weight for PM<sub>2.5</sub> populations that would be used in calculating the 25 percent set-aside that must be used for PM<sub>2.5</sub> reduction strategies in any State that has a PM<sub>2.5</sub> nonattainment or maintenance area. This section also identifies the legislative basis for the rulemaking in 23 U.S.C. 149(k)(1), as amended by MAP-21 section 1113(b)(6).

Section 790.103 Applicability. This section clarifies that this proposed regulation would apply to all States that have a PM<sub>2.5</sub> nonattainment or maintenance area. It would not apply to States that do not have a PM<sub>2.5</sub> nonattainment or maintenance area.

Section 790.105 Definitions. This section establishes that definitions contained in 23 U.S.C. 101(a) are applicable to this part. It also defines some additional terms that would be used in the proposed regulation. It includes a definition for Criteria Pollutant, Maintenance Area, National Ambient Air Quality Standards, Nonattainment Area, and Weighted Populations.

Section 790.107. Weighting Factors for Determining Weighted Populations. Subsections (a), (b), and (c) of this section would present the weighting factors for ozone and CO that are incorporated into the calculation of State apportionments of CMAQ funding under MAP-21 and are used as part of the weighted population formula for the calculation of the PM<sub>2.5</sub> set-aside. While MAP-21 does not include a weighted population formula, it directed that the FY 2009 CMAQ and total State apportionments be used as the basis for calculating CMAQ apportionments under MAP-21. The FY 2009

CMAQ apportionments were calculated based on the weighted values in the most recent statutory apportionment formula from SAFETEA-LU for ozone and CO. Retaining these weights is necessary in order to be consistent with the approach under MAP-21 of using FY 2009 apportionments as the basis for CMAQ funding. These weights are included in the rulemaking to clarify the ozone and CO weighting factors to be used in the PM<sub>2.5</sub> set-aside formula. However, since they are based in prior statute, FHWA is not proposing changes to these weighting factors.

Subsection (d) would incorporate the weighting factor chosen by FHWA for PM<sub>2.5</sub> as a result of this rulemaking. As discussed above, MAP-21 makes clear that populations in PM<sub>2.5</sub> nonattainment areas must also be weighted, but it does not establish a specific weighting factor for those populations. This subsection would establish an appropriate weighting factor for PM<sub>2.5</sub>. The FHWA is seeking comments on establishing a weighting factor of 5 for PM<sub>2.5</sub> populations, as discussed in more detail in the next section.

#### **<HD1>IV. Determine PM<sub>2.5</sub> Weighting Factor**

The FHWA is proposing to set a weighting factor of 5 for PM<sub>2.5</sub> areas. The FHWA requests comments on this weighting factor. The FHWA requests that commenters provide comments on whether setting the weighting factor at 5 may present any implementation concerns for States or local transportation agencies, and if so, how FHWA could address those concerns.

Based upon FHWA's review of the serious health impacts of PM<sub>2.5</sub> as described above, and Congress' direction to reduce PM<sub>2.5</sub> emissions, as evidenced by its action to set-aside a portion of CMAQ funds to address PM<sub>2.5</sub> emissions, FHWA believes it is

reasonable to establish a weighting factor of 5. Given the severity of PM<sub>2.5</sub> health impacts, a weight substantially higher than the weights for ozone and carbon monoxide is appropriate. Setting a higher weight for PM<sub>2.5</sub> relative to the other two criteria pollutants is consistent with the emphasis by Congress on PM<sub>2.5</sub> reduction strategies by singling them out for the set-aside. Using the combined weight for the two other criteria pollutants, ozone and carbon monoxide, as a point of reference, FHWA believes that a weight for PM<sub>2.5</sub> of approximately twice the weight for both of these criteria pollutants combined is reasonable. The highest combined weight for ozone and carbon monoxide populations is 2.4.<sup>8</sup> Given the severe health impacts of PM<sub>2.5</sub> as discussed above, FHWA, therefore, believes that a weight for PM<sub>2.5</sub> populations of 5 is appropriate. FHWA requests comments on this weighting factor.

#### **<HD1>V. Illustrations of Effects of Weighting on Funding Levels for PM<sub>2.5</sub> Set-aside**

The FHWA's analyses indicate that setting the weighting factor at 5, as compared to the 1.2 used for FY 2013 and 2014, only produces a modest difference in the amount of funding required to be set aside for PM<sub>2.5</sub> reduction strategies in States with PM<sub>2.5</sub> nonattainment or maintenance areas. The 25 percent priority established by Congress still functions as a maximum or a ceiling for this dedicated portion of CMAQ funding. For illustrative purposes, a hypothetical example of a CMAQ apportionment at \$100 million is presented below to demonstrate the order of magnitude of the change in the resulting values for the PM<sub>2.5</sub> set-aside, using 1.2, 2.5, and 5 as factors for weighted

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<sup>8</sup> Based on the previous CMAQ apportionment formula, the weighting factor for an extreme ozone nonattainment area is 1.4 and the weighting factor for a CO area is 1.0. The combined weights for ozone and CO is calculated as follows: 1.4 + 1.0 = 2.4.

populations in PM<sub>2.5</sub> nonattainment areas<sup>9</sup>.

<b>Illustrative CMAQ Apportionment at \$100 Million</b>	<b>Illustrative PM<sub>2.5</sub> Set-aside at 1.2</b>	<b>Illustrative PM<sub>2.5</sub> Set-aside at 2.5</b>	<b>Illustrative PM<sub>2.5</sub> Set-aside at 5</b>
<b>\$100,000,000</b>	<b>\$19,667,367</b>	<b>\$21,449,921</b>	<b>\$22,693,414</b>

#### **<HD1>Rulemaking Analyses and Notices**

All comments received before the close of business on the comment closing date indicated above will be considered by FHWA and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable.

#### **<HD1>Executive Order 12866 (Regulatory Planning and Review) and DOT**

##### **Regulatory Policies and Procedures**

The FHWA has determined preliminarily that this action would be a significant rulemaking action within the meaning of Executive Order 12866 and would be significant within the meaning of the DOT's regulatory policies and procedures. This action is considered significant based upon FHWA's review of the serious health impacts of PM<sub>2.5</sub> as described above, and Congress' direction to reduce PM<sub>2.5</sub> emissions, as evidenced by its action to set aside a portion of CMAQ funds to address PM<sub>2.5</sub> emissions.

However, this rulemaking is not considered economically significant within the meaning of Executive Order 12866 because this action would only have a limited impact on funding levels and affect a small measure of change in the existing CMAQ program.

This rulemaking proposes to set forth requirements for the CMAQ Program, which would

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<sup>9</sup> Population in ozone and CO nonattainment and maintenance areas were weighted using factors as described in section 790.107.

not change overall levels of State apportionments. Regardless of the weighting factor for PM<sub>2.5</sub> that FHWA chooses to establish through this rulemaking, a State's total apportionment under the CMAQ program will not change; only the amount that the State would be required to set-aside for projects that reduce PM<sub>2.5</sub> would change. As illustrated in the table above, regardless of whether FHWA selects a weighting factor of 1.2, 2.5, or 5, only modest differences would result in the portion set aside for PM<sub>2.5</sub>. This rulemaking may result in minimal costs to grantees, and FHWA seeks comment on administrative or other costs that may be incurred as a result of the proposed weighting factor. The proposed change is not anticipated to materially and adversely affect any sector of the economy. In addition, FHWA does not anticipate that these proposed changes would create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

#### **<HD1>Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), FHWA has evaluated the effects of this proposed action on small entities and has determined that the proposed action would not have a significant economic impact on a substantial number of small entities.

The proposed rule addresses requirements for the use of CMAQ funds in certain States for implementing the CMAQ Program. As such, it affects only States, and States are not included in the definition of a small entity set forth in 5 U.S.C. 601. Therefore, the Regulatory Flexibility Act does not apply, and I hereby certify that this action would not have a significant economic impact on a substantial number of small entities.



### **<HD1>Unfunded Mandates Reform Act of 1995**

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, March 22, 1995, 109 Stat. 48). This proposed rule would not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$143.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector. Additionally, the definition of “Federal Mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

### **<HD1>Executive Order 13132 (Federalism)**

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has preliminarily determined that this proposed action would not warrant the preparation of a federalism assessment. The FHWA has also determined that this proposed action would not preempt any State law or State regulation or affect the States’ ability to discharge traditional State governmental functions.

### **<HD1>Executive Order 12372 (Intergovernmental Review)**

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372

regarding intergovernmental consultation on Federal programs and activities apply to this program.

**<HD1>Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this proposal does not contain collection of information requirements for the purposes of the PRA.

**<HD1>National Environmental Policy Act**

The agency has analyzed this action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that it will not have any significant effect on the quality of the environment and meets the criteria for a categorical exclusion under 23 CFR 771.117(c)(20).

**<HD1>Executive Order 12630 (Taking of Private Property)**

The FHWA has analyzed this proposed rule under Executive Order 12630, Governmental Actions and Interface with Constitutionally Protected Property Rights. The FHWA does not anticipate that this proposed action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

**<HD1>Executive Order 12898 (Environmental Justice)**

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a), 91 FR 27534 (May 10, 2012) (available online at [www.fhwa.dot.gov/enviornment/environmental\\_justice/ej\\_at\\_dot/order\\_56102a/index.cf](http://www.fhwa.dot.gov/enviornment/environmental_justice/ej_at_dot/order_56102a/index.cf)

m), require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority and low income populations in the United States. The DOT Order requires DOT agencies to address compliance with the Executive Order and the DOT Order in all rulemaking activities. In addition, on June 14, 2012, the FHWA issued an update to its EJ order, FHWA Order 6640.23A, FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations (available online at [www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm](http://www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm)).

The FHWA has evaluated this proposed rule under the Executive Order, the DOT Order, and the FHWA Order. The agency has determined that the proposed rule, if finalized, would not cause disproportionately high and adverse human health and environmental effects on minority or low income populations. This action proposes to establish the weight applied in calculating the PM<sub>2.5</sub> set-aside under the CMAQ Program. The selected weight would be used only to determine the amount of apportioned CMAQ funds that each State must obligate to projects that reduce PM<sub>2.5</sub> emissions. The same weight would be applied nationwide. The States, as grantees, would decide which projects they would like to fund with the set-aside, including which PM<sub>2.5</sub> nonattainment or maintenance areas should host the projects and thereby benefit from reduced PM<sub>2.5</sub> emissions. As part of the environmental review process required before FHWA approves funding for a State-selected project, the FHWA will evaluate the potential EJ impacts of

the project pursuant to the Executive Order, DOT Order, and FHWA Order described above.

**<HD1>Executive Order 12988 (Civil Justice Reform)**

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**<HD1>Executive Order 13045 (Protection of Children)**

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this proposed action would not cause any environmental risk to health or safety that might disproportionately affect children.

**<HD1>Executive Order 13175 (Tribal Consultation)**

The FHWA has analyzed this action under Executive Order 13175 and believes that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. The proposed rulemaking addresses the weighting factor for the PM<sub>2.5</sub> areas for use in determining the weighted population to be included in the calculations of the PM<sub>2.5</sub> set-asides under 23 U.S.C. 149(k), and would not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

**<HD1>Executive Order 13211 (Energy Effects)**

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have

determined that it is not a significant energy action under that order since it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Therefore, a Statement of Energy Effects is not required.

**<HD1>Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

Issued on: July 21, 2014

Gregory G. Nadeau,  
Deputy Administrator  
Federal Highway Administration

In consideration of the foregoing, the FHWA proposes to add part 790 to title 23, subchapter H, Code of Federal Regulations, to read as follows:

**PART 790—CONGESTION MITIGATION AND AIR QUALITY**

**IMPROVEMENT**

Sec.

790.101 Purpose.

790.102 Applicability.

790.103 Definitions.

790.104 Weighting factor for determining weighted population.

**Authority:** 23 U.S.C. 149; 49 CFR 1.85.

**§ 790.101 Purpose.**

The purpose of this part is to establish the weighting factors, as directed by 23 U.S.C. 149(k)(1), for the calculation of weighted population to determine the 25 percent of the funds apportioned under section 23 U.S.C. 104(b)(4) for any State that has a PM<sub>2.5</sub> nonattainment or maintenance area that must be obligated to fund projects that reduce PM<sub>2.5</sub> emissions in such area.

**§ 790.103 Applicability.**

This part applies to all States that have a PM<sub>2.5</sub> nonattainment or maintenance area.

**§ 790.105 Definitions.**

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this part. As used in this part:

*Criteria pollutant* means any pollutant for which there is established a NAAQS at 40 CFR part 50. The transportation related criteria pollutants per 40 CFR 93.102(b) are carbon monoxide, nitrogen dioxide, ozone and particulate matter (PM<sub>10</sub> and PM<sub>2.5</sub>).

*Maintenance area* means any geographic region of the United States that the Environmental Protection Agency (EPA) previously designated as a nonattainment area for one or more pollutants pursuant to the Clean Air Act Amendments of 1990 and subsequently redesignated as attainment subject to the requirement to develop a maintenance plan under section 175A of the Clean Air Act, as amended.

*National Ambient Air Quality Standards (NAAQS)* means those standards established by the EPA pursuant to section 109 of the Clean Air Act.

*Nonattainment area* means any geographic region of the United States that EPA has designated as nonattainment under section 107 of the Clean Air Act for any pollutant

for which a national ambient air quality standard exists.

*Weighted population* means the population of each county within a designated ozone, carbon monoxide (CO), and PM<sub>2.5</sub> nonattainment and maintenance area that would be given a relative value, or weighting to reflect the severity of the pollutant classification or designation.

**§ 790.107 Weighting factors for determining weighted population.**

- (a) For purposes of 23 U.S.C. 149(k)(1), for an ozone nonattainment and maintenance area, the weighting factors determined are as follows:
  - (1) Marginal nonattainment area, the weighting factor is 1.0.
  - (2) Moderate nonattainment area, the weighting factor is 1.1.
  - (3) Serious nonattainment area, the weighting factor is 1.2.
  - (4) Severe nonattainment area, the weighting factor is 1.3.
  - (5) Extreme nonattainment area, the weighting factor is 1.4.
  - (6) Maintenance area, the weighting factor is 1.0.
- (b) For purposes of 23 U.S.C. 149(k)(1), for a carbon monoxide nonattainment and maintenance area, the weighting factor is 1.0.
- (c) For purposes of 23 U.S.C. 149(k)(1), for areas that are designated nonattainment or maintenance for ozone and carbon monoxide, the weighting factor is 1.2 multiplied by the applicable ozone factor as defined in paragraph (a) of this section.
- (d) For purposes of 23 U.S.C. 149(k)(1), for a PM<sub>2.5</sub> nonattainment area, the weighting factor is 5.0. For a PM<sub>2.5</sub> maintenance area, the weighting factor is 1.0.

- (e) For purposes of 23 U.S.C. 149(k)(1), for areas that are designated nonattainment or maintenance for ozone and nonattainment for PM<sub>2.5</sub>, the weighting factor is 5.0 multiplied by the applicable ozone factor as defined in paragraph (a) of this section.

<FRDOC> [FR Doc. 2014-17786 Filed 8-1-14; 8:45 am]

<BILCOD>BILLING CODE 4910-22-P

[FR Doc. 2014-17786 Filed 08/01/2014 at 8:45 am; Publication Date:  
08/04/2014]